No. 14-1185

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA SANDS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 700,

Intervenor.

On Petition for Review of an
Order of the National Labor Relations Board

BRIEF FOR INTERVENOR UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 700

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief for the National Labor Relations Board.

B. Ruling Under Review. References to the rulings at issue appear in the Brief for the National Labor Relations Board.

C. Related Cases. This case has not previously been before this Court or any other court.

Respectfully submitted,

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Dated: May 1, 2015

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BRIEF FOR INTERVENOR UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 700

STATEMENT OF THE CASE

This case concerns the adequacy of a notice given by United Food and Commercial Workers International Union, Local 700 to petitioner Laura Sands concerning her rights and obligations under the union security clause contained in the Union's 2003-2008 collective bargaining agreement covering Kroger grocery stores at various locations in Indiana. In early 2012, Indiana enacted a statute prohibiting the negotiation or application of union security clauses to workplaces located in that State. Indiana Code § 22-6-6-8. *See* 29 U.S.C. § 164(b). Accordingly, the current collective bargaining agreement covering Kroger grocery stores in Indiana no longer contains a union security clause.

Sands was hired by Kroger in December 2004 to work at its Crawfordsville, Indiana store. JA 79. In January 2005, Local 700 sent Sands two letters explaining that, under the union security clause in the Union's collective bargaining agreement with Kroger, she had the option of joining Local 700 as a member or refraining from joining and that if she elected to remain a nonmember she could become an objector and pay an amount reduced to reflect the Union's expenditures that are not germane to collective bargaining. JA 79-80. In response to the second letter, which was sent in late January, Sands joined Local 700 as a

full member and began paying membership dues and an initiation fee. JA 80. Sands continued to be a union member and continued to pay full dues until June 17, 2005, when she left employment at Kroger.

On June 25, 2005 – one week after she left employment at Kroger – Sands wrote to Local 700 resigning her union membership and filing an objection to paying fees for any purpose unrelated to collective bargaining. JA 80. Unaware that Sands had left employment at Kroger, Local 700 promptly responded to her resignation and objection by providing her with information about the reduced amount she would owe under the union security clause as an objecting nonmember. JA 80.

On June 30, 2005, Sands filed unfair labor practice charges with the NLRB alleging that Local 700 had: i) "failed to inform [Sands] of her right to be or remain a nonmember"; ii) "misled and failed to inform [Sands] that as a nonmember she would have had the right . . . to object to paying for nonrepresentational activities and to receive a reduction in fees"; and iii) "failed to provide [Sands] with the percentage reduction in dues and fees for nonmember objectors" in accordance with "*Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000)." JA 37.

After investigating Sands' unfair labor practice charges, the NLRB General Counsel determined that only the third allegation had merit. Accordingly, the

General Counsel issued a complaint alleging that Local 700 had violated the Act when it "failed to notify Unit employee Laura Sands of the percentage reduction in dues for employees who elect to become or remain nonmembers of [Local 700] pursuant to *Communications Workers v. Beck*, 487 U.S. 735 (1988)." JA 39 ¶ 6.

The NLRB dismissed the General Counsel's complaint "finding that the Union did not violate Section 8(b)(1)(A) of the Act by failing to provide [Sands] with the reduced fees and dues applicable to nonmember objectors when it first advised her of her obligations under the union-security clause." JA 87. Sands has petitioned for review of the Board's dismissal of the General Counsel's complaint.

SUMMARY OF ARGUMENT

The petition for review should be dismissed, because the petitioner is not a person aggrieved by the NLRB's order in this case. If the petition is not dismissed, the Court should use this case as the occasion: i) to clarify it prior decisions regarding the information that a union must include in its initial notice to employees under *Communications Workers v. Beck*, 487 U.S. 735 (1988); and ii) to reconsider its refusal to apply a deferential standard of review to NLRB decisions regarding the contents of such initial *Beck* notices.

In deciding this case, the NLRB proceeded on the mistaken understanding that this Court's prior decisions require unions to provide detailed financial information in the initial *Beck* notice. To the contrary, this Court's leading

decision in *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995), rejected the claim that such information needs to be included in the initial notice.

In *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000), this Court treated *Abrams* as precluding deferential review of an NLRB decision regarding the contents of the initial *Beck* notice and held that the Board erred in approving a notice that did not include the percentage by which the fees charged to an objecting nonmember will be reduced from the amount charged to nonobjectors. Subsequent changes in the NLRB's rules defining various other aspects of the required objection procedures under *Beck* demonstrate the error of *Penrod*'s ruling in this regard.

The Court should reconsider *Penrod*'s refusal to apply a deferential standard of review and, applying the correct standard, should affirm the Board's decision in this case. If the Court refuses to reconsider this aspect of *Penrod*, it should remand this case to the Board for further consideration in light of the Court's clarification of what *Abrams* and *Penrod* actually require with respect to the information included in an initial *Beck* notice.

STANDING

Sands' last day of employment at Kroger was June 17, 2005, a week before she resigned from union membership and two weeks before she filed her unfair labor practice charges. Sands has given no indication that she is likely to return to employment under the Kroger-Local 700 collective bargaining agreement. And,

even if she did, Sands would no longer be covered by a union security clause in that agreement, because Indiana prohibited such clauses in early 2012. *See* Indiana Code § 22-6-6-8. Thus, Sands has no personal interest in the subject matter of this case.[1]

"[A]nyone can file the initial unfair labor practice charge, even total 'strangers'" to the dispute. *Richards v. NLRB*, 702 F.3d 1010, 1017 (7th Cir. 2012), quoting *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17 (1943). The charging party "merely initiates the proceeding by bringing a charge, he does not prosecute the violator before the Board," that is the task of the NLRB General Counsel. *Concrete Materials of Ga., Inc. v. NLRB*, 440 F.2d 61, 67 (5th Cir. 1971). If a charging party wishes to challenge the Board's decision in court, however, she must demonstrate that the Board's "order results in an 'adverse effect in fact.'" *Richards*, 702 F.3d at 1014. This requires a showing that the Board's decision has "resulted in a cognizable injury to the Charging Part[y]" or a showing that there is "an[] imminent threat that the Charging Part[y] will face the same

[1] During her seven months of employment at Kroger, Sands paid a total of $212.50 to Local 700 in dues and initiation fees to satisfy her financial obligations as a full member of the Union. There is no allegation in this case that Sands' membership was anything other than completely voluntary. Thus, a dues reimbursement remedy would have been inappropriate. *See Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961). Nevertheless, in an unsuccessful attempt to avoid wasting resources in litigation Local 700 returned to Sands the entire amount she had paid in dues and initiation fees plus interest. *See* Pet. Br. 9 ("Sands no longer works for Kroger and has been refunded dues").

injury that prompted the complaint." *Pirlott v. NLRB*, 522 F.3d 423, 433 (D.C. Cir. 2008).

The only concrete injury that Sands claims to have suffered by the Board's dismissal of the General Counsel's complaint is the denial of a "notice posting . . . advising employees that the NLRB has protected their rights." Pet. Br. 7 (citation and quotation marks omitted). But Sands no longer works for Kroger and would not herself see any notice that was posted on a Kroger employee bulletin board.

Sands also claims standing to seek some undefined "remedy affording relief to the many 'similarly situated' employees in the Kroger bargaining unit who have also been denied a proper *Beck* notice since the filing of this charge in June 2005." Pet. Br. 9-10. Even assuming there is such a group of employees who would have been entitled to relief had the Board found merit to the General Counsel's complaint, Sands herself was not injured by denial of relief to those employees.

The Court should dismiss the petition for review on the grounds that Sands is not aggrieved by the Board's order. 29 U.S.C. § 160(f).

ARGUMENT

The ultimate legal question before the Court in this case is whether the Board erred in ruling "that a union does not breach its duty of fair representation when it chooses not to calculate and include in its initial *Beck* notice detailed information about the specific amount of reduced fees and dues that would apply to

Beck objectors." JA 81. *See Communications Workers v. Beck*, 487 U.S. 735, 745 (1988).[2] The fact that this Court reviewed a similar NLRB ruling in *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000), poses two threshold questions that require consideration before the Court reaches that ultimate question.

The first threshold question arises from the fact that, in rendering its decision in this case, the Board proceeded on the premise that this Court's *Penrod* decision "concluded that *Hudson*, as interpreted in *Abrams*, required unions to give potential *Beck* objectors the same information provided to actual *Beck* objectors." JA 83. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995). We believe that the Board has misread *Penrod* and submit that whatever else may eventuate, the decision in this case should rest on a correct reading of *Abrams* and *Penrod*. We,

[2] As the NLRB's decision explains, "the Board [has] announced a comprehensive set of procedures designed to implement the *Beck* decision" that take the form of "a three stage process: the initial notice stage (stage 1), the objection stage (stage 2), and the challenge stage (stage 3)." JA 80. At the notice stage, unions that have negotiated union security clauses are required to inform covered employees that they have the right to refrain from union membership and that nonmembers have the right to object to paying the full amount normally required under the union security clause. The initial *Beck* notice given to employees at stage 1 must contain sufficient information to allow the employees to intelligently decide whether to object and an explanation of the procedure for objecting. At stage 2, the union reduces the fee charged to objecting nonmembers in an amount that reflects the union's expenditures on matters that are germane to collective bargaining and provides the objectors with an explanation of the calculation of the reduced fee. At stage 3, the objecting nonmembers are provided with an opportunity to challenge the calculation of the reduced fee.

therefore, begin our argument by carefully analyzing both decisions to demonstrate that they do not require that potential *Beck* objectors be given the same information as actual objectors. Rather, the most that those decisions require is that the notice to potential objectors include a reasonable estimate of the amount of the reduction in the fee charged to objectors.

The second threshold issue arises from the fact that *Penrod* refused to apply a deferential standard of review to the NLRB's decision regarding the contents of the initial *Beck* notice. The Court's refusal to apply the normal deferential standard of review is called into question by significant recent developments in the Board's elaboration of "the rules for translating the generalities of the *Beck* decision . . . into a workable system for determining and collecting agency fees." *Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir. 2000). The discussion of the contents of the *Beck* notice provided to potential objectors in *Abrams* took place in the context of an objection procedure that gave employees annual notice of their right to object and required them to renew any objection annually. That was the approach recommended by the NLRB General Counsel at that time. Since then, the Board itself has held that unions are *not* required to give annual *Beck* notices and that unions may *not* require nonmembers to renew objections annually. We submit that these changes in the rules for implementing *Beck* are directly relevant to the content of the *Beck* notice and thus present the occasion for the Court to

reconsider *Penrod*'s refusal to apply a deferential standard of review.

I. *ABRAMS* AND *PENROD* DO NOT REQUIRE THE *BECK* NOTICE GIVEN TO POTENTIAL OBJECTORS TO INCLUDE DETAILED INFORMATION ABOUT THE SPECIFIC AMOUNT OF REDUCED FEES CHARGED TO ACTUAL OBJECTORS.

A. The Role of the Board in Crafting Rules for the Implementation of the Supreme Court's *Beck* Decision.

In *Beck*, the Supreme Court "held that § 8(a)(3) [of the National Labor Relations Act] allows unions to collect and expend funds over the objection of nonmembers only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 36 (1998). Implementing that decision, "[t]he Board has held . . . that unions have an obligation to notify employees of their *Beck* rights," and "[t]he Board is currently in the process of defining the content of the notification right to give guidance to unions about what they must do to notify employees about their rights under *Beck*." *Id*. at 43.

Recognizing that "[a]ll the details necessary to make the rule of *Beck* operational were left to the Board," this Court has repeatedly acknowledged that "[i]t is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision . . . into a workable system for determining and collecting agency fees." *Thomas*, 213 F.3d at

657, quoting *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1016 (7th Cir. 1998). *Accord Pirlott*, 522 F.3d at 432. Given the "significant nature of the deference due to the Board" in accomplishing this task, this Court has been "very cautious in entertaining an invitation to reverse the Board." *Thomas*, 213 F.3d at 657.

Penrod departs from this highly deferential approach in reviewing the Board's attempts "to make the rule of *Beck* operational." *Thomas*, 213 F.3d at 657. *Penrod* involved review of an NLRB decision in which "[t]he Board held that unions have no obligation to tell employees who have not yet exercised their *Beck* rights what percentage of dues are spent on nonrepresentational activities." 203 F.3d at 43. The *Penrod* Court determined that it "need not consider whether to defer to [the Board's] reasoning, for this issue is squarely controlled by *Hudson* as interpreted by this court in *Abrams*." *Id*. at 47. In this regard, *Penrod* read *Abrams* as holding "that potential objectors . . . must be told the percentage of union dues that would be chargeable were they to become *Beck* objectors." *Ibid*.

In the instant case, the Board took things a step further by reading *Penrod* as "conclud[ing] . . . that *Hudson*, as interpreted in *Abrams*, required unions to give potential *Beck* objectors the *same information* provided to actual *Beck* objectors." JA 83 (emphasis added). That is a misreading of both *Penrod* and *Abrams*. It is, moreover, a misreading that affected the Board's consideration of the notice issue

in this case, because it caused the Board to proceed on the mistaken assumption that *Penrod* presented the agency with an all or nothing choice with regard to the sort of financial information that might be provided to potential objectors.

B. *Abrams* Approved a *Beck* Notice that Did Not State the Specific Amount that Would be Charged to Objecting Nonmembers.

Abrams was a breach of the duty of fair representation lawsuit brought in federal court and not a review case arising from unfair labor practice proceedings before the NLRB. The *Abrams* lawsuit challenged the objection procedure adopted by the Communications Workers of America (CWA), the defendant union in *Beck*.

This Court described the three stages of the CWA objection procedure as follows:

> "CWA informs nonmembers of their right to object by a notice distributed yearly to all employees. The notice appears in the Union newsletter, the *CWA News*. The notice provides a general description of the Union's procedure for receiving and handling objections and the classes of expenses it considers both 'chargeable' (related to collective bargaining and other employee representation activities) and 'nonchargeable' (related to other union activities). The Union distributes the notice in March and objectors may file at any time through mid-June. CWA's fee year begins in July. . . . At the beginning of the fee year an objector receives from the

Union an 'advance reduction' payment equal to the amount attributable to nonchargeable expenditures that will be deducted from his paychecks during the coming year. Along with the payment the Union provides a detailed accounting of the expenses and a description of its expenses it considers chargeable and nonchargeable. The description is more detailed than the one included in the Union's general notice.

"The amount of the advance reduction payment is calculated by an outside accounting firm. . . . Any employee who challenges the amount of the advance reduction must do so within 30 days of receiving the payment. Under CWA policy the objection is then referred to arbitration." 59 F.3d at 1376 (record citations omitted).

The principal district court opinion in *Abrams* described in detail the initial CWA *Beck* notice to *potential* objectors that appeared in the union's newsletter:

"The notice defines in general terms the sorts of expenditures that nonmembers may opt out of financing and also cites examples of 'chargeable' and 'nonchargeable' expenditures. *The notice also reports that CWA's experience over the past seven years has been that 'chargeable' expenditures make up about 80-85% of total union expenditures, while 'nonchargeable' expenditures make up about 15-20% of the total.* Finally, the notice explains the method for filing an objection, and the rights that the

> CWA accords to those who do so." *Abrams v. Communications Workers*, 818 F. Supp. 393, 397 (D.D.C. 1993) (record citations omitted; emphasis added).

The district court opinion also described the information "explain[ing] the calculation of the fee reduction" that accompanied CWA's letter to *actual* objectors stating the specific amount of their fee reduction:

> "Attached to that letter is a detailed list of examples of 'chargeable' and 'nonchargeable' expenditures, taken from CWA's actual practice in allocating expenditures, so that the fee payer will be able to determine whether he or she disagrees with the union's allocation of those expenditures. Also attached to the letter is a detailed report by CWA's accountants showing the actual allocation of union expenditures to the chargeable and nonchargeable categories. This report explains the methods used for allocating different sorts of expenditures." *Id.* at 398 (record citations omitted).

The *Abrams* plaintiffs "argue[d] that CWA breaches its duty of fair representation by providing nonmembers detailed information about the propriety of the [reduced] fee only after nonmembers object to paying the full fee" and "that CWA must provide nonmembers with background figures that justify the agency fee before the nonmembers must file their objections." 818 F.Supp. at 402. The

district court rejected these arguments, finding that CWA's *Beck* notice "provides all the information that is necessary for a nonmember to determine whether or not he or she wants to object to payment of the full agency fee." *Ibid*.

To demonstrate that the CWA *Beck* notice provided "information [that] is sufficient to allow nonmembers to make an informed decision on whether they wish to object," the district court noted that the notice included:

> "(1) a statement that members may object to their fees and receive an advance reduction payment, (2) examples of chargeable and nonchargeable expenses and *an estimation of the approximate portion of CWA expenditures in each category*, and (3) a promise that all objectors will be given a full explanation of the calculation of the fee reduction." 818 F.Supp. at 402-03 (emphasis added).

By contrast, "[t]he detailed accounting that plaintiffs wish CWA to provide to all nonmembers simply is not necessary to a reasoned objection decision" and "is necessary only to an objector's decision to challenge CWA's calculation of nonchargeable expenses." *Id*. at 403. Thus, the district court concluded that "[t]he time and money CWA would have to expend" to provide "detailed accounting information" to potential objectors "cannot be justified by the nonexistent benefit that would result." *Ibid*.

The district court further observed that *Chicago Teachers Union v. Hudson*,

475 U.S. 292 (1986), "supports CWA's position" regarding when it is appropriate to provide a detailed accounting of the reduced fee's calculation:

> "In *Hudson*, nonmembers automatically paid a reduced fee without having to file an objection. 475 U.S. at 295. The only decision facing nonmembers was whether to challenge the amount of their fee reduction. To facilitate that decision, the Supreme Court stated that the union had to provide detailed accounting information. That stage in *Hudson* is analogous not to the initial objection stage, . . . but to the subsequent challenge/arbitration stage when CWA already provides this information." 818 F.Supp. at 402 n. 9.

On appeal, this Court subjected the CWA *Beck* notice to close scrutiny and in the end found the notice to be defective in only two respects, neither of which involved the estimation of the percentage of union expenditures in the chargeable and nonchargeable categories. First, the court of appeals concluded "that the CWA notice inadequately explains the nature of a worker's right to object to payment of the full agency fee," because "[t]he notice describes the right to object as arising 'under the Communications Workers of America policy' instead of from the restrictive interpretation placed on the Union's statutory authority by the *Beck* Court." 59 F.3d at 1380. This Court believed that "[c]haracterizing the right as CWA 'policy' could lead an employee to conclude that objecting would be futile

because the decision to grant a reduction rests entirely within the Union's discretion." *Ibid*. In the court's view, "an adequate side notice under *Hudson* must alert an employee to his *legal* right to object to payment of a full agency fee." *Ibid.* (emphasis in original). In this regard, the Court explained that "the same 'basic considerations of fairness'" applied in *Hudson* "necessarily extend to a union's notice to workers of their *right* to object to payment." *Id*. at 1379 n. 6 (emphasis in original).[3] The Court also found that the CWA notice "use[d] language which might lead workers to conclude that [certain nonchargeable] activities are chargeable." *Id*. at 1380. Significantly, the Court did *not* fault the CWA notice for including only "an estimation of the approximate portion of CWA expenditures in each [chargeable/nonchargeable] category." 818 F.Supp. at 403.

Immediately following this Court's decision, CWA reissued its *Beck* notice, correcting the two legal deficiencies found by the Court. *See Abrams v. Communications Workers*, 23 F. Supp. 2d 47, 52 (D.D.C. 1998) (explaining that to comply with the court of appeals decision a revised notice "must state clearly that the right to object is a legal one" and "also define chargeable expenditures as those

[3] The Board has expressed its "agree[ment] with the Court of Appeals for the District of Columbia that the same 'basic considerations of fairness' [that under *Hudson* apply to the union's explanation of the reduced fee charged to actual objectors] necessarily extend to a union's notice to nonmembers of their right to object to payment of nonrepresentational expenses." *California Saw & Knife Works*, 320 NLRB 224, 233 n. 50 (1995), citing *Abrams*, 59 F.3d at 1379 n. 6. *See also id*. at 233 & n. 48, citing *Abrams*, 59 F.3d at 1379 n. 7.

'germane to collective bargaining, contract administration, and grievance adjustment'"). The revised notice came before this Court on CWA's appeal from an order requiring that all CWA-represented agency fee payers be given the opportunity to retroactively object for the years 1987-95. *Abrams v. Communications Workers*, No. 99-7095, 2000 WL 560861 (D.C. Cir. March 20, 2000). Relying upon the immediate reissuance of a revised notice conforming to this Court's decision, CWA argued that "where a 'financial core payor' had received notice after [this Court's] 1995 judgment conforming to the requirement of that judgment and had raised no objection for any of the years covered by the proper notices, that financial core payor should not be allowed to object with respect to prior years." *Id*. at *1. The Court found that this argument had merit under the remedial principles stated in *Rochester Mfg. Co.*, 323 NLRB 260 (1997), which allow a union "to limit liability by showing that financial core payors have made no objection in response to proper notice from 1995 forward." *Ibid*.[4]

We have attached as an addendum to this brief the page from the appendix in the last *Abrams* appeal showing the "revised notice conforming to this Court's decision" that the Court found to be "proper notice." *Abrams v. Communications*

[4] The Court, nevertheless, remanded the case for the district court to determine whether the order was nevertheless appropriate as "a punitive sanction" appropriate for the purpose "of discouraging a party's disregard of others' legal rights." *Id*. at *2. The *Abrams* case then settled, obviating the need for any such determination by the district court.

Workers, No. 99-7095, Appendix p. 144. Like the earlier CWA notices, the revised notice does not state a specific fee that will be charged to actual objectors but merely contains an approximate range of figures based on the union's fee reduction calculations for recent years.[5]

In sum, far from "requir[ing] unions to give potential *Beck* objectors the same information provided to actual *Beck* objectors," JA 83, *Abrams* rejected the claim that potential objectors must be given the same information as actual objectors. What is more, *Abrams* approved a *Beck* notice that gave potential objectors an estimate of the range of possible fee reductions rather than "specific reduced payment information." JA 83.

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[5] After describing the "'chargeable' expenditures," the revised notice stated:

> "In the past, approximately 75-80% of the International Union's expenditures have gone for such activities. The percentages of Local Union expenditures on 'chargeable' activities have generally been higher."

And, after describing "the expenditures treated as 'nonchargeable,'" the revised notice stated:

> "In the past, approximately 20-25% of the International Union's expenditures have gone for such 'nonchargeable' expenditures. The percentages of Local Union expenditures on 'nonchargeable' activities have generally been lower."

Changes to the revised notice are shown in boldface. The portions stating the approximate ranges of chargeable and nonchargeable expenditures were not changed and thus are not boldfaced. *See* Addendum.

C. *Penrod* Does Require that the *Beck* Notice Contain Information About the Amount of the Fee that Actual Objectors Will Be Charged But Did Not Specify that a Precise Figure Is Required.

Unlike *Abrams*, *Penrod* did arise from unfair labor practice proceedings before the NLRB. The NLRB decision under review in *Penrod* "held that unions have no obligation to tell employees who have not yet exercised their *Beck* rights what percentage of dues are spent on nonrepresentational activities." 203 F.3d at 43. Concluding that "this issue is squarely controlled by *Hudson* as interpreted by this court in *Abrams*," the *Penrod* Court held that "new employees and financial core payors . . . must be told the percentage of union dues that would be chargeable they to become *Beck* objectors." *Id*. at 47.

Since *Penrod* purported to do nothing more than apply *Abrams*, the reference to "the percentage of union dues that would be chargeable . . . [to] objectors," 203 F.3d at 47, must be understood as encompassing "an estimation of the approximate" range of chargeable and nonchargeable percentages, *Abrams*, 818 F. Supp. at 403. *Abrams* specifically held that an estimation of the fee charged to objectors provided "sufficient information to allow nonmembers to make an informed decision on whether they wish to object." *Ibid*. *See also Abrams*, 2000 WL 560861, at * 1 (stating that the revised CWA notice containing such an estimation of the fee reduction was a "proper notice" that "conform[ed] to the requirement of [the Court's 1995] judgment").

The *Penrod* Court did *not* hold that "the initial *Beck* notice must include an explanation of the method used to calculate the fee." 203 F.3d at 48. Refusing to reach that issue, the *Penrod* decision expressly distinguished "the financial information designed for *Beck* objectors" from "the initial *Beck* notice given to new employees and financial core payors." *Ibid*. In this regard, *Penrod* "[r]eject[ed] petitioners' contention that [information about] the method of calculation" is necessarily entailed in "disclosure of the fee itself." *Ibid*.

In sum, the Board's reading of *Penrod* is wrong. "The *Penrod* court" did *not* "conclude[] that *Hudson*, as interpreted in *Abrams*, required unions to give potential *Beck* objectors the same information provided to actual *Beck* objectors." JA 83. Rather, both *Penrod* and *Abrams* allow a wider range of reasonable options with regard to the financial information provided to potential objectors in a union's initial *Beck* notice.

II. THIS COURT SHOULD RECONSIDER *PENROD*'S REFUSAL TO DEFER TO THE NLRB'S DETERMINATION REGARDING THE CONTENTS OF THE *BECK* NOTICE TO POTENTIAL OBJECTORS.

As we noted at the outset, *Penrod* reversed the Board's prior ruling "that unions have no obligation to tell employees who have not yet exercised their *Beck* rights what percentage of dues are spent on nonrepresentational activities," without even considering "whether to defer to [the Board's] reasoning" on the ground that "this issue is squarely controlled by *Hudson* as interpreted by this court in

Abrams." 203 F.3d at 43 & 47. Indeed, Judge Tatel, the author of the Court's *Penrod* opinion, separately concurred to observe that "[a]bsent *Abrams*, we would evaluate the Board's reasoning pursuant to a highly deferential standard," but "*Abrams*' extension of *Hudson* to new employees and financial core payors has foreclosed us from considering the Board's rationale at all." *Id*. at 50. We respectfully submit that, especially in light of changes the Board has made – after the *Abrams* decision – in the agency's articulation of the "rules for translating the generalities of the *Beck* decision . . . into a workable system for determining and collecting agency fees," *Thomas*, 213 F.3d at 657, the *Abrams* decision does not prevent the Court from applying the normal deferential standard of review in this case.

Two changes in the NLRB's *Beck* rules have a direct bearing on the contents of the initial *Beck* notice, because they make it impossible for the notice to contain specific information about the amount of the reduced fee charged to actual objectors. What is more the interrelationship between the changed rules and the contents of the notice to potential objectors demonstrate that *Penrod* erred in singling out the contents of the notice as a matter on which the Board is owed no deference.

At the time of the *Abrams* decision, the only NLRB guidance on union compliance with *Beck* came in the form of two memoranda from the NLRB

General Counsel. *See* Mem. GC 92-5 (May 11, 1992); Mem. GC 88-14 (Nov. 15, 1988). These memoranda suggested that unions adopt objection procedures that operate on an annual basis. Each year, the union would notify potential objectors of their right to object. Each year, those nonmembers who wished to do so would file an objection that was effective for only the ensuing year. Each year, the union would calculate the reduced fee to be charged for the coming year based on the prior year's expenditures. And, each year the objectors would be given an explanation of that calculation and an opportunity to challenge it in arbitration.

The objection procedure reviewed in *Abrams* closely followed the suggestions contained in the NLRB General Counsel memoranda with regard to issuing notice, receiving objections, calculating fee reductions and resolving disputes all on a yearly cycle. *See* 59 F.3d at 1376 (describing the yearly cycle of that procedure). *Abrams* specifically linked its approval of the annual objection requirement with the issuance of an adequate notice, explaining that it is "not . . . unreasonable . . . that each [non]member be required to object each year so long as the union continues to disclose what it must before objections are required to be made." 59 F.3d at 1382 (citation and quotation marks omitted). In the context of an objection procedure that operates on an annual basis, it would be possible for a union that regularly receives objections to knowledgeably estimate the amount of the reduced fee for the coming year. What is more, reasonably current information

about the expected amount of the fee reduction in the coming year could affect an employee's decision about whether to renew an objection for that year.

In post-*Abrams* decisions, the Board has rejected both the annual notice requirement and the option of requiring annual renewal of objections. The Board first made clear that "the *Beck* 'notice requirement is satisfied by giving the unit employee notice once and is not a continuing requirement.'" *Steelworkers Local 4800 (George E. Failing Co.)*, 329 NLRB 145, 146 (1999), quoting *Paperworkers Local 1033 (Weyerhauser Paper Co.)*, 320 NLRB 349, 350 (1995). More recently, the Board held that "absent a more compelling rationale or other procedures that minimize the burden of annual objection . . . , a union violates its duty of fair representation if it declines to honor nonmember employees' express, written statement to the union that they object on a continuing basis to supporting union activities not related to collective bargaining and contract administration." *Machinists Local Lodge 2777 (L-3 Communications Vertex Aerospace LLC)*, 355 NLRB 1062, 1069 (2010).

As this Court recognized in *Abrams*, the rule with respect to annual objections has a direct relationship to the rules regarding the notice to potential objectors. 59 F.3d at 1382. In the present context, where potential objectors receive a single notice of their right to file an objection that may continue over the entire term of their employment, it is literally impossible to predict the precise

figure that objectors will be charged in future years. Thus, the post-*Abrams* changes in the rules for implementing *Beck* have the most direct bearing on what sort of information must be included in the notice to potential objectors.

These subsequent changes in "the rules for translating the generalities of the *Beck* decision . . . into a workable system" demonstrate why "[*a*]*ll* the details necessary to make the rule of *Beck* operational" – including the details of the *Beck* notice – should be "left to the Board, subject to the very light review authorized by *Chevron*." *Thomas*, 213 F.3d at 657 (emphasis added). More to the point, these changes expose the error in *Penrod*'s determination that a prior judicial decision in a case that did not arise from the NLRB's efforts to "make the rule of *Beck* operational," *Thomas*, 213 F.3d at 657 – indeed, a judicial decision premised on a different set of rules from the ones the Board has subsequently defined – precludes deferential review of the Board's decision regarding the contents of the *Beck* notice.

We would add that, even if the context had not changed as it has, *Penrod*'s conclusion that *Abrams* stands as an absolute bar precluding deferential review of later Board rulings on matters addressed in *Abrams* is inconsistent with the mainstream of circuit court precedent on the review of Board rulings under *Beck*. For that reason alone, *Penrod* should be reconsidered.

Precisely the situation presented in *Penrod* was faced by the Seventh Circuit

in *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (1998) – a precedent that this Court has repeatedly cited as correctly describing "[t]he significant nature of the deference due to the Board in [duty of fair representation] cases" applying *Beck*. *Thomas*, 213 F.3d at 657. *See also Pirlott*, 522 F.3d at 432. In that case, the Seventh Circuit was asked to reconsider its prior ruling in *Nielsen v. Int'l Ass'n of Machinists & Aerospace Workers*, 94 F.3d 1107, 1116-17 (7th Cir. 1996), approving an aspect of the Machinists' objection procedure that the Board had disapproved in the case under review. Even though the latter case involved a feature of the very same objection procedure that had been previously approved in *Nielsen* and even though the very NLRB decision under review had been criticized in *Nielsen* on the very point at issue, the Seventh Circuit nevertheless concluded that "normal *Chevron* analysis is the order of the day." 133 F.3d at 1019. In this regard, the Seventh Circuit explained that "*Nielsen* [was] a private case [in which] we were asked to use our judgment and apply the best rule to [the] circumstances," while "[i]n the present case we are asked to strike down the Board's rule, and we can do that only if convinced not that it is incorrect but that it is unreasonable." *Ibid*.

"[D]eferential review of agency action implies that a court may have to uphold a rule that it would not have adopted as an original matter." *Int'l Ass'n of Machinists & Aerospace Workers*, 133 F.3d at 1019. Thus, whatever the Court

may have held in *Abrams* "in the context of a private litigation," once "the Board has established and defended its position, normal *Chevron* analysis is the order of the day." *Ibid*. For instance, were the Board's decision that unions may not require annual objections to come before this Court for review, we would not expect the approval of the annual objection requirement in *Abrams* to preclude deferential review of the Board's later decision.

By the same token, *Abrams* should not preclude deferential review of NLRB decisions "defining the content of the notification right to give guidance to unions about what they must do to notify employees about their rights under *Beck*." *Marquez*, 525 U.S. at 43. As the Seventh Circuit aptly observed, "[t]he Board knows more about the flow of information in labor markets than judges do," and there is no need for a reviewing court to "entangle [itself] in excessively particularistic inquiries into the details of the notification process." *Int'l Ass'n of Machinists & Aerospace Workers*, 133 F.3d at 1019.

The Board's "[b]alancing [of] employees' need for information against the burden on unions of providing the information" in this case easily satisfies the "highly deferential standard" of review applied by this Court to other aspects of the NLRB rules for implementing *Beck*. *Penrod*, 203 F.3d at 50 (Tatel, J., concurring). This is fully demonstrated by the brief for the NLRB in this case and is not really disputed by the petitioner. Accordingly, the Court should reconsider

its refusal to apply a deferential standard of review to the Board's rulings on the contents of the *Beck* notice and, applying that standard of review, affirm the Board's decision.

III. IF THE PETITION FOR REVIEW IS GRANTED, THE COURT SHOULD CLARIFY *PENROD*'S HOLDING WITH REGARD TO THE CONTENTS OF THE *BECK* NOTICE AND REMAND THIS CASE TO THE BOARD FOR FURTHER CONSIDERATION.

Penrod did interpret *Abrams* as holding the *Beck* notice to potential objectors must include some information about the amount of the fee that will be charged to objectors and did conclude that this holding was binding on the Board. Thus, if *Penrod*'s refusal to apply a deferential standard of review is not reconsidered, that precedent would seem to require a remand to the Board for an application of *Penrod* and *Abrams*. However, that remand should be accompanied by clarification of what those decisions would actually require of the Board.

As we have demonstrated, in deciding this case, the Board proceeded on the mistaken understanding that this Court's *Abrams* and *Penrod* decisions "requir[e] all unions to treat every employee at stage 1 of the *Beck* process the same as those employees who have become nonmembers and who, at stage 2 of that process, actually have objected." JA 83. The Board refused to impose that requirement because it determined that "the potential benefits to employees of requiring unions to include detailed reduced payment information in their initial *Beck* notices" were outweighed by the "risk[of] saddling unions with administrative and financial

burdens that many unions might find impossible or impractical to meet." JA 87.

The Board did not consider the option – actually approved in *Abrams* – of including in the notice to potential objectors "an estimation of the approximate portion of [its] expenditures in [the chargeable and nonchargeable] categor[ies]." *Abrams*, 818 F.Supp. at 403. There are a number of ways that a union could reasonably make that approximation without "the full-fledged undertaking of calculating chargeable and nonchargeable expenses." JA 84. Larger unions could use the allocations on their annual Form LM-2 reports to the Department of Labor. JA 86 n. 65. Smaller local unions could rely on estimates of chargeable and nonchargeable expenditures by their parent national organization. JA 86 n. 67. *See Thomas*, 213 F.3d at 659-63. And, the unusual small union that has neither sort of data available to use in making an estimate of the reduced fee could base its approximation on an informal review of its presumably quite simple set of accounts.

In deciding this case, the Board proceeded on the incorrect understanding that the only choice was either requiring the inclusion of "detailed information about the specific amount of reduced fees" in the notice or not requiring any information about the amount of the reduced fees. JA 81. If this Court does not reconsider its *Penrod*'s refusal to apply a deferential standard of review, it should remand to the Board with an explanation that this third option is open.

CONCLUSION

If the Court does not dismiss the petition for review for lack of standing, it should reconsider its *Penrod* decision and deny the petition. If the Court does not reconsider *Penrod*, it should remand this case to the Board with instructions on a proper construction of the *Penrod* decision.

Respectfully submitted,

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ADDENDUM

Revised Notice Regarding Union Security Agreements and Agency Fee Objections

This revised notice regarding union security agreements and agency fee objections is being published in response to the majority opinion in *Abrams v. CWA* (D.C. Cir., July 21, 1995). **The changes in this notice from the notice published earlier this year are printed in bold face. These changes in the notice are intended to spell out the Union's legal obligations and the corresponding rights of objectors in terms provided for in that decision and do not reflect any change in CWA's system for making objections, for the handling of objections made, or for the determination of the agency fee paid by objectors. In particular, if you have already filed an objection for the period July 1995 through June 1996 it is not necessary for you to do so again.**

As a general matter, employees covered by a collective bargaining agreement containing a union security clause are required, as a condition of employment, to pay an agency fee equal to normal union dues (and, where applicable, initiation fees). While the wording of these clauses is not perfectly uniform, none requires more than the payment of this agency fee to retain employment.

The Communications Workers of America policy on agency fee objections is the Union's means of meeting its legal obligations to employees covered by union security clauses and of effectuating those employees' legal rights as stated in the applicable decisions of the United States Supreme Court (including *Beck v. CWA*) and the companion lower court and labor agency decisions. Under the CWA policy, employees who are not members of the Union, but who pay agency fees, pursuant to a union security clause, may request a reduction in that fee based on their objection to certain kinds of Union expenditures. New Jersey public employees are covered by the demand and return system applicable to them, and are not covered by this policy.

The policy provides an objection period each year during May, followed by a reduction in the objector's fee for the twelve months beginning with July and running through June of the following year. **(See point 3 below for the objection period applicable this year only.)**

Briefly stated, CWA's objection policy works as follows:

1. The agency fee payable by objectors will be based on the Union's expenditures for those activities or projects **"germane to collective bargaining, contract administration, and grievance adjustment" within the meaning of applicable United States Supreme Court decisions.**

Among these "chargeable" expenditures are those going for negotiations with employers, enforcing collective bargaining agreements, informal meetings with employer representatives, discussion of work-related issues with employees, handling employees' work-related problems through the grievance procedure, administrative agencies, or informal meetings, and union administration. In the past, approximately 75-80% of the International Union's expenditures have gone for such activities. The percentages of Local Union expenditures on "chargeable" activities have generally been higher.

Among the expenditures treated as "nonchargeable," which objectors will not be required to support, are those going for community service **(including participating in charitable events)**, legislative activity, cost of affiliation with non-CWA organizations, support of political candidates, **participating in political events**, recruitment of members to the Union, and members-only benefits **(including members-only social events)**. In the past, approximately 20-25% of the International Union's expenditures have gone for such "nonchargeable" expenditures. The percentages of Local Union expenditures on "nonchargeable" activities have generally been lower.

2. Objectors will be given a full explanation of the basis for the reduced fee charged to them. That explanation will include a more detailed list of the categories of expenditures deemed to be "chargeable" and those deemed to be "nonchargeable," and the independent certified public accountants' report showing the Union's expenditures on which the fee is based. **In addition to any other avenue of relief available under the law,** objectors will have the option of challenging the Union's calculation of the reduced fee before an impartial arbitrator appointed by the American Arbitration Association, and a portion of the objector's fee shall be held in escrow while he or she pursues that challenge. Details on the method of making such a challenge and the rights accorded to those who do so will be provided to objectors along with the explanation of the fee calculation.

3. Objections for the period of July through June **normally** must be sent during May; **however, for the July 1995-June 1996 fee year only, CWA will accept objections filed at any time from May 1 through September 30, 1995.** In addition, agency fee payers who are new to the bargaining unit may object within thirty days of receiving this notice, and employees who resign union membership may object within thirty days of becoming an agency fee payer. Employees filing late objections for either of these two reasons should so indicate in their letter of objection. **New bargaining unit members are to receive this notice prior to any demand being made upon them for the payment of agency fees. If, however, for any reason a new unit member begins paying agency fees prior to the receipt of this notice, he or she may object retroactively to the commencement of such payments and for the duration of the current annual objection period.**

The letter of objection should include their name, address, CWA Local number, employer and social security number.

Objections must be sent to the Agency Fee Administrator, CWA, 501 Third Street, NW., Washington, DC 20001-2797.

CWA News. Sept. 1995

PLAINTIFF'S EXHIBIT 11

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Circuit Rule 32(a)(2)(B) because this brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 14-point type in a Times New Roman font style.

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Date: May 1, 2015

CERTIFICATE OF SERVICE

I, James B. Coppess, certify that on May 1, 2015, the foregoing Brief for Intervenor United Food and Commercial Workers International Union, Local 700 was served on all parties or their counsel of record through the CM/EFC system if they are registered users, or, they are not, by serving a true and correct copy at the addresses listed below:

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